

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 5270-541D BY MONTANA DEPARTMENT OF STATE LANDS

**FILMED**  
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER  
APR 9 1976

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice a hearing on objections to the above-entitled application was held in the Banquet Room of the Blue Anchor Bar and Cafe at Twin Bridges, Montana, at 1:30 p.m., on Tuesday, January 20, 1976, Richard Gordon, Hearing Examiner, presiding.

Randall Biehl and Bob Conboy appeared and presented testimony and evidence on behalf of the Applicant, the Montana Department of State Lands. The Applicant was represented by Counsel Alan Joscelyn, Esq., of Helena. The Applicant offered into evidence six exhibits: 1. a Highway Department map of Madison County; 2. a map of the Applicant's proposed project; 3. a graph of flow figures computed on a combined average monthly basis over a 49-year period depicting the flow in the Big Hole River at a gaging station at a point near Melrose, Montana; 4. a year-by-year chart of the minimum flow in the Big Hole River in August at a gaging station at a point near Melrose, covering the years of 1925 through 1975; 5. a year-by-year chart of the minimum flow during the period April 1 to September 30 on the Big Hole River at a gaging station at a point near Melrose for the years 1925 through 1975; and 6. a chart of the velocity of the flow in the Big Hole River at various times during the 1973 irrigation season, with the amount of time required for water to flow from the Applicant's proposed point of diversion to each of the two objectors' points of diversion at such various times of the year. Said exhibits were entered and numbered as Applicant's Exhibits 1 through 6, accordingly.

Appearing on behalf of the Objector, Big Hole Cooperative Ditch Company, were Ed Albert, Norman Ashcraft, Allen Dean, Bill Dillet, Ella Dillet, Ethelyn Nelson, Ethelyn V. Elford, Camilla Gage, Larry Maddon, Martin Nelson, A. W. Peterson, and S. J. Seidensticker. The Ditch Company was represented by Counsel W. G. Gilbert, Jr., Esq., of Dillon, Montana. The Ditch Company offered into evidence one exhibit: a document filed in Volume 238, pages 327 to 330, Book of Records of Madison County, Montana, entitled, "Location of Water Right--Notice of Appropriation," showing each of the Ditch Company's member's claimed water rights by name of the appropriator, the number of acres irrigated, the location of irrigated acres, and

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the claimed right in miner's inches as of January 1, 1919. The document further described the Ditch Company's facilities. Said exhibit was entered and numbered accordingly as Objector's Exhibit 1.

S. J. Seidensticker also appeared personally and presented testimony in support of his separate objection to the above-described application. Mr. Seidensticker was represented by Counsel W. G. Gilbert, Jr., Esq., of Dillon, Montana.

Louise Balkovetz was present at the hearing as a representative of the Pageville Canal Company. Neither Ms. Balkovetz nor the Pageville Canal Company was a formal party to the proceedings.

T. J. Reynolds appeared personally and presented evidence and testimony on behalf of the Department of Natural Resources and Conservation.

#### MOTIONS

At the hearing, Mr. Gilbert made several motions objecting to the introduction of evidence, testimony, and exhibits offered by the Applicant and by the Department of Natural Resources and Conservation. Said evidence consisted primarily of charts of minimum flow measurements at a gaging station along the Big Hole River near Melrose, Montana. Mr. Gilbert based his objections upon the alleged hearsay nature of the information contained in the charts, as well as upon the relevance to the proceedings of the information contained therein. The motions were taken under advisement at the hearing to be ruled upon in the Proposed Order.

Section 89-8-100(2), R.C.M. 1947, provides that the common law and statutory rules of evidence do not apply for hearings held pursuant to the Montana Water Use Act, unless all the parties to a particular hearing stipulate that such rules do apply for that particular hearing. The record in the instant matter showed no such stipulation. The record further showed that all parties specifically affirmed at the hearing that they did not wish to stipulate that the formal rules of evidence be followed. Consequently, the admissibility of evidence at the hearing was governed neither by the common law, rules of evidence, nor by statutory rules of evidence, but rather by the sound discretion of the Hearing Examiner as to the possible relevance of the information sought to be entered.

It was ruled that sufficient grounds existed to support the view that the evidence objected to may fairly be viewed as potentially pertinent to a full consideration of all issues raised by the criteria delineated in Section 89-885, R.C.M. 1947. Consequently, Mr. Gilbert's motion rose to the level of challenges to the weight to be accorded the evidence, rather than to the admissibility of the evidence itself. The motions were denied, and the exhibits entered accordingly.

A Proposed Order (Proposal for Decision) was issued by the Hearing Examiner, Richard Gordon, on March 18, 1976.

The Proposed Order as issued provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral argument before the Administrator.

On March 31, 1976, the Department received "Exceptions to Proposed Order," dated March 30, 1976, as filed by W. G. Gilbert, Jr., attorney for Seidensticker Ranch, Inc., S. J. Seidensticker individually, and the Big Hole Cooperative Ditch Company, in opposition to the Hearing Examiner's Proposed Order of March 18, 1976, in the matter of Application No. 5270-s41D by the Montana Department of State Lands.

In Mr. Gilbert's exception he states in part:

"Exception is made to Proposed Findings of Fact No. 7, which is as follows: ' . . . said claimed rights total 2,000 miner's inches of water . . . ' whereas Proposed Finding of Fact No. 2 recites that the prior rights claimed by said Big Hole Cooperative Ditch Company totals 20,000.00 miner's inches."

"Argument: It appears that such mistake contained in said Proposed Findings of Fact No. 7 is a scrivener's error."

On April 1, 1976, the Department received an "Exception to Proposed Order," dated April 1, as filed by Alan Joscelyn, attorney for the Montana Department of State Lands, in opposition to the Hearing Examiner's Proposed Order of March 18, 1976, in the matter of its Application No. 5270-s41D.

Mr. Joscelyn's exception states as follows:

"The Department of State Lands hereby takes exception with the proposed order insofar as it restricts the Department's use of water to the period beginning May 1 and ending July 30 of each year. The Department contends that there is sufficient water in the source of supply to allow the Department the right to use up to 4.23 cubic feet per second during the period extending from July 31 to August 15 of each year. The Department hereby requests the opportunity to be heard in regard to this exception."

The Department by letter of April 23, 1976, to Mr. W. G. Gilbert, Jr., with copies to S. J. Seidensticker, Ethelyn V. Elford, Randall Biehl, and Alan Joscelyn, acknowledged receipt of his Exception and stated in part in reply to said Exception

as follows: "Please be advised that the Department agrees with your Exception that the claimed water right of 2,000 miner's inches for the Big Hole Cooperative Ditch Company as found on page 10, item 7, line 5, of the Proposed Findings of Fact of the Proposed Order is indeed a scrivener's error. That figure of 2,000 miner's inches is in error and will be corrected to read 20,000 miner's inches. As you know, you would have the opportunity and right at this time to file a brief supporting your exception and further request oral argument before the Water Resources Division Administrator. However, we would assume that the scrivener's error would not necessitate such attention. Please reply within seven (7) days after receipt of this letter indicating if in fact our assumption as noted above is correct." A request for an oral argument hearing nor the filing of a brief was made by Mr. Gilbert.

By letter of April 23, 1976, the Department informed Alan Joscelyn, attorney for the Montana Department of State Lands, with copies to W. G. Gilbert, Jr., and Randall Biehl, that an exception had been filed by Mr. Gilbert on behalf of his several clients. It was pointed out that the Exception was directed entirely to a scrivener's error, which the Department agrees is incorrect, as found in the Proposed Order. Mr. Joscelyn was requested to review the attached enclosures and reply in writing within seven days, indicating if he agreed with the exception, and the incorrect figure will be corrected to read 20,000 miner's inches instead of 2,000 miner's inches.

The Department also by letter of April 23, 1976, to Alan Joscelyn advised him of his opportunity to file a brief supporting State Land's Exception within 15 days after receipt of said letter. Mr. Joscelyn was also informed of his right to request an oral argument hearing on the exception before the Administrator of the Department's Water Resources Division.

On May 3, 1976, the Department received a letter dated May 3 from Mr. Joscelyn in reply to the Exception filed by Mr. Gilbert on behalf of his objector-clients. Mr. Joscelyn stated, "This department agrees that the exception is correct and that the error should be corrected. I would like to call your attention to another error in the proposed order which should be corrected. In proposed finding of fact number 5, on page 8, third line from the bottom of the page, 2.248 gallons per minute should read 2,248 gallons per minute."

The Department by letter of May 6, 1976, to Mr. Joscelyn with a copy to Mr. Gilbert acknowledged receipt of the Department of State Land's letter of May 3, agreeing with certain scrivener's errors present in the Proposed Order. The Department advised Mr. Joscelyn that the error in the Proposed Order as noted



will be corrected, since the Department agrees that the figure should read 2,248 gallons per minute and not 2.248 gallons per minute.

On May 7, 1976, the Department received a letter dated May 6 from Mr. Joscelyn stating, "... in regard to the exception this Department filed April 1 in the matter of Application No. 5270-s41D. Please be advised that this Department will not file a brief in support of this exception." By letter of May 11, 1976, to Mr. Joscelyn, the Department acknowledged receipt of Mr. Joscelyn's letter of May 6, and requested him to reply in writing within five days after receipt of said letter indicating if State Lands wished to make oral argument on its exception before the Administrator. A copy of said Department letter was sent to Mr. Gilbert.

On May 19, 1976, the Department received Mr. Joscelyn's letter of May 17, stating, "The Department of State Lands will not request an opportunity for oral argument on our exception entered in the matter of Application No. 5270-s41D."

The Department by letter of May 24, 1976, to Mr. Joscelyn with a copy to Mr. Gilbert acknowledged receipt of Mr. Joscelyn's letter of May 17, and advised that since they had declined the opportunity to present oral argument on State Land's exception, the Administrator of the Water Resources Division would proceed to prepare and issue a Final Order based on the record in the Application file.

Since none of the parties in this matter requested an oral argument hearing on the Exceptions before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Proposed Order (Proposal for Decision) issued by the Hearing Examiner on March 18, 1976, the objections, exceptions, and all pertinent information filed by all parties to this matter and made a permanent record of the Application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter of Application No. 5270-s41D by the Montana Department of State Lands, as entered on March 18, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that Proposed Findings of Fact are corrected to read as follows:

- A. Page 8, Item 5, line 24, "2.248 gpm" is hereby corrected to read "2,248 gpm"
- B. Page 10, Item 7, line 5, "2,000 M.I." is hereby corrected to read "20,000 M.I."

And further, except that the Proposed Order is hereby slightly modified as follows in Items 1, 2, 3, and 5, and Items 6 and 7 are new, added provisions.

#### FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is granted in the following limited and modified form only, allowing the

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appropriation of no more than 9.36 cubic feet per second of water equivalent to 4,203 gallons per minute, not to exceed 1,395 acre-feet per annum, from the Big Hole River, a tributary of the Jefferson River, in Madison County, Montana, to be diverted from the Big Hole River at two points: the  $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 2, Township 3 South, Range 9 West, M.P.M., and the SW $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 35, Township 2 South, Range 9 West, M.P.M., and to be used for irrigation on a total of 609 acres, more or less, in Section 36, Township 2 South, Range 9 West, M.P.M., from May 1 to July 30, inclusive, of each year.

2. The Applicant is not allowed to appropriate water pursuant to this Provisional Permit from the period of August 1 to September 20, inclusive, of each year, or during any other times of the year not authorized by this permit; and as well is not allowed to appropriate water pursuant to this Provisional Permit during such other portions of the period from May 1 to July 31, inclusive, of each year, when there is insufficient water in the Big Hole River at the objectors' respective points of diversion to meet the objectors' prior rights to water from the Big Hole River.

3. This Provisional Permit is granted subject to all prior existing water rights in the source of supply.

4. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring devices to enable the Applicant to control and keep a record of all quantities of water diverted, as well as the periods of diversion. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

5. This Provisional Permit is granted subject to any final determination of prior existing water rights as provided by Montana law.

6. The issuing of this Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of its Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

7. It shall be the responsibility of the Objectors and nonobjectors with prior water rights to notify the Applicant when, in fact, there is insufficient water in the Big Hole River to satisfy both the prior rights of the Objectors and nonobjectors, and the water use granted by this Provisional Permit. It shall be the responsibility of the Applicant to cease diverting water immediately pursuant to this Provisional Permit when there is insufficient water in the Big Hole River to satisfy both the prior water rights of the objectors and nonobj

and the water use granted by this Provisional Permit, whether or not the Applicant is notified by the objectors or nonobjectors. It shall be the responsibility of all parties not to abuse their water rights at the expense of the others.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation where practical, and keep a log of records of water beneficially used in order to provide proof of their water rights.

Done this 28th day of February 1977

*Orin Harris*  
Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation  
Natural Resources Building  
32 South Ewing  
Helena, MT 59601

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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	
NO. 5270-s41D BY THE MONTANA	)	<u>PROPOSAL FOR DECISION</u>
DEPARTMENT OF STATE LANDS	)	

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Pursuant to the Montana Water Use Act and the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-entitled application was held in the Banquet Room of the Blue Anchor Bar and Cafe at Twin Bridges, Montana, at 1:30 p.m. on Tuesday, January 20, 1976, Richard Gordon, Hearing Examiner, presiding.

Mr. Randall Biehl and Mr. Bob Conboy appeared and presented testimony and evidence on behalf of the Applicant, the Montana Department of State Lands, hereinafter referred to as "State Lands". The Applicant was represented by Counsel, Mr. Alan Joscelyn, Esq., of Helena. The Applicant offered into evidence six exhibits: 1. a Highway Department map of Madison County; 2. a map of the Applicant's proposed project; 3. a graph of flow figures computed on a combined average monthly basis over a 49-year period depicting the flow in the Big Hole River at a gauging station at a point near Melrose, Montana; 4. a year-by-year chart of the minimum flow in the Big Hole River in August at a gauging station at a point near Melrose, Montana, covering the years from 1925



through 1975, inclusive; 5. a year-by-year chart of the minimum flow during the period April 1 to September 30 on the Big Hole River at a gauging station at a point near Melrose for the years 1925 through 1975, inclusive; and 6. a chart of the velocity of the flow in the Big Hole River at various times during the 1973 irrigation season, with the amount of time required for water to flow from the Applicant's proposed point of diversion to each of the two objectors' points of diversion at such various times of the year. Said exhibits were entered and numbered as Applicant's Exhibits No. 1 through 6 accordingly.

Appearing on behalf of the Objector, Big Hole Cooperative Ditch Company, hereinafter referred to as "Ditch Company" were Mr. Ed Albert, Mr. Norman Ashcraft, Mr. Allen Dean, Mr. Bill Dillet, Ms. Ella Dillet, Ms. Ethelyn V. Elford, Ms. Camilla Gage, Mr. Larry Maddon, Ms. Ethelyn Nelson, Mr. Martin Nelson, Mr. A.W. Peterson, and Mr. S.J. Seidensticker. The Ditch Company was represented by Counsel, Mr. W.G. Gilbert, Jr., Esq., of Dillon, Montana. The Ditch Company offered into evidence one exhibit: a document filed in Volume 238, pages 327-330, Book of Records of Madison County, Montana, entitled, Location of Water Right -Notice of Appropriation, showing each of the Ditch Company's member's claimed water rights by name of the appropriator, the number of acres irrigated, the location of irrigated acres, and the claimed

right in miner's inches as of January 1, 1919. The document further described the Ditch Company's facilities. Said exhibit was entered and numbered accordingly as Objectors Exhibit No. 1.

Mr. S.J. Seidensticker also appeared personally and presented testimony in support of his separate objection to the above-described application. Mr. Seidensticker was represented by counsel, Mr. W.G. Gilbert, Jr., Esq., of Dillon, Montana.

Ms. Louise Balkovetz was present at the hearing as a representative of the Pageville Canal Company. Neither Ms. Balkovetz nor the Pageville Canal Company were formal parties to the proceedings.

Mr. T.J. Reynolds appeared personally and presented evidence and testimony on behalf of the Department of Natural Resources and Conservation.

#### MOTIONS

At the hearing, Mr. Gilbert made several motions objecting to the introduction of evidence, testimony and exhibits offered by the Applicant and by the Department of Natural Resources and Conservation. Said evidence consisted primarily of charts of minimum flow measurements at a gauging station along the Big Hole River near Melrose, Montana. Mr. Gilbert based his objections upon the alleged heresay nature of the information contained in the charts, as well as upon the

relevance to the proceedings of the information contained therein. The motions were taken under advisement at the hearing to be ruled upon herein.

89-8-100(2), R.C.M. 1947, provides that the common law and statutory rules of evidence do not apply for hearings held pursuant to the Montana Water Use Act, unless all the parties to a particular hearing stipulate that such rules do apply for that particular hearing. The record in the instant matter shows no such stipulation. The record further shows that all parties specifically affirmed at the hearing that they did not wish to stipulate that the formal rules of evidence be followed. Consequently, the admissibility of evidence at the hearing was governed neither by the common law, rules of evidence, nor by statutory rules of evidence, but rather by the sound discretion of the Hearing Examiner as to the possible relevance of the information sought to be entered.

It is hereby ruled that sufficient grounds exist to support the view that the evidence objected to may fairly be viewed as potentially pertinent to a full consideration of all issues raised by the criteria delineated in Sec. 89-885, R.C.M. 1947. Consequently, Mr. Gilbert's motions rise to the level of challenges to the weight to be accorded the evidence, rather than to the admissibility of the evidence itself. The motions are hereby denied, and the exhibits entered accordingly.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order to the Administrator of the Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On April 17, 1975, the Applicant, the Montana Department of State Lands originally submitted Application No. 5270-s41D to the Department of Natural Resources and Conservation, seeking to appropriate 3,300 gallons per minute not to exceed 960 acre-feet per annum from the Big Hole River, a tributary of the Jefferson River, in Madison County, Montana, to be diverted from the Big Hole River at a point in the SE1/4 NE1/4 SW1/4 of Section 35, Township 2 South, Range 9 West of the Montana Principal Meridian, to be used for irrigation on a total of 480 acres, more or less in Section 36, Township 2 South, Range 9 West of the Montana Principal Meridian from May 1 to September 20, inclusive of each year. Said application was subsequently amended by the Applicant so as to seek the appropriation of 11.73 cubic feet per second or 5,270 gallons per minute of water and not to exceed 1,394 acre-feet per annum from the Big Hole River, a tributary of the Jefferson River, in Madison County, Montana, to be diverted from the Big Hole River at two points: the W1/2 NW1/4 NE1/4 of Section 2, Township 3 South, Range 9 West of the Montana Principal Meridian and the SW1/4



NE1/4 NW1/4 of Section 35, Township 2 South, Range 9 West, of the Montana Principal Meridian, and used for irrigation on a total of 620 acres, more or less, in Section 36, Township 2 South, Range 9 West, of the Montana Principal Meridian, from May 1 to September 20, inclusive, of each year.

2. On October 27, 1975 the Big Hole Cooperative Ditch Company, through Mr. Allen Dean, Mr. Edward P. Elford, Ms. Ethelyn V. Elford, and Mr. S.J. Seidensticker filed a timely objection to the above-described application alleging a prior water right on behalf of seventeen landowners. Said prior right totals 20,000 miners inches from the Big Hole River and is allegedly used for irrigation on a total of 4,000 acres and for stockwatering on a year round basis. The objectors further alleged that there is no unappropriated water in the Big Hole River when the river is low and when existing water users are irrigating.

3. On November 10, 1975, Mr. S.J. Seidensticker, on behalf of the objector, Seidensticker Ranch Inc., filed a timely objection to the above-described application alleging a prior right to water from the Big Hole River sufficient to irrigate 1200 acres from May 1 to October 15 of each year, and sufficient to water 2,500 head of cattle year-round. The objector alleged that said water right constitutes the oldest water right along the Big Hole River. The objector further alleged that there exists a shortage of water in the Big Hole River during the minimum flow period.

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4. On November 13, 1975, the Montana Department of Fish and Game filed a timely objection to the above-described application alleging that the Big Hole River is severely dewatered during the irrigation season, that such condition leads to a temperature increase in the Big Hole River which approaches the critical level for trout, that such condition further leads to a lowering of the dissolved oxygen levels in the Big Hole River which in turn leads to bacterial disease outbreaks, that such outbreaks resulted in a "die-off" of Mountain Whitefish in September 1974, and that increased upstream diversion will result in an increasingly adverse effect upon the fish population of the Big Hole River. The Objector requested that the permit be denied. The Department of Fish and Game was notified by letter on December 8, 1975 that non-diversionary fish and wildlife uses were not recognized by Montana law prior to July 1, 1973. Since July 1, 1973, such non-diversionary fish and wildlife uses must be specifically obtained through application to the Department of Natural Resources and Conservation for Water Reservation pursuant to 89-890, R.C.M. 1947. Fish and Game has not sought a Reservation status for the Big Hole River. Consequently, they were notified that their objection is invalid. No representative of Fish and Game appeared or presented evidence or testimony at the hearing.

5. At the hearing Mr. Randall Biehl testified on behalf of the Applicant, Montana Department of State Lands, that the Applicant intends to lease the land described in the application to lessees who would then sprinkle-irrigate said lands pursuant to the above-described application for the purpose of cultivating alfalfa. At the hearing, the State Lands representatives requested that their appropriation be modified as follows: that the requested 5,280 gallons per minute be changed to 4,203 gallons per minute; that the requested 11.73 cubic feet per second be changed to 9.36 cubic feet per second (total acre-feet to remain the same); and that the 620 acres to be irrigated be changed to 609 acres by reducing the number of acres in the SW1/4 of Section 36, Township 2 South, Range 9 West of the Montana Principal Meridian from 140 acres to 129 acres. Each of these requested changes constituted a lesser figure than appeared in the application as of the date of the hearing. Consequently the requested changes were granted. At the hearing the State Lands representatives testified that the proposed point of diversion in Section 2, Township 3 South, Range 9 West would have a 100 horsepower pump, diverting 1,955 gallons per minute. The proposed point of diversion in Section 35, Township 2 South, Range 9 West would have a 100 horsepower pump diverting approximately 2.248 gallons per minute. The State Lands representatives testified that the application was changed so as to request two points of

*Corrected cases*  
*2.248 - 2.248*

diversion instead of one point of diversion since two separate lessees would be involved in the project and since it was consequently felt that the project would be better administered through the use of a separate point of diversion for each lessee. The State Lands representatives testified that easements are in the process of being executed with the parties who currently own the land which lies between the proposed points of diversion and the land to which the appropriated water would be applied. The State Lands representatives testified that a vertical lift of 277 feet must be overcome for water from the northern pump site to reach its intended place of use. The State Lands representatives testified that a vertical lift of 259 feet must be overcome for water from the southern pump site to reach its intended place of use. Testimony was introduced to the effect that an adequate pumping system is being planned. The State Lands representatives testified that the land to be irrigated is not currently under either irrigation or cultivation. Testimony was introduced to the effect that Mr. Don Smith and Mr. Harry Morse are currently expected to be the two lessees of the land described in the application. Mr. Smith was not present at the hearing. Mr. Morse was present, but only as an observer. He did not present any evidence or testimony.

6. Mr. T.J. Reynolds testified that the drainage in the Big Hole River basin, above the proposed points of diversion, is 2,368 square miles. Mr. Reynolds testified



that the average runoff in the basin amounts to 334 acre-feet of water per square mile per year, based upon flow figures measured at the gauging station along the Big Hole River near Melrose, several miles downstream from the proposed points of diversion, and approximately 30 miles upstream from all of the objectors' points of diversion. Mr. Reynolds testified that based upon a crop of alfalfa, and based upon the original figures of 620 acres to be irrigated, the irrigation requirements for the project amount to 1.9 acre-feet of water per acre on a normal year and 2.6 acre-feet of water per acre on a dry year, totaling 1,178 acre-feet of water on a normal year and 1,612 acre-feet of water on a dry year.

7. Representatives of the Big Hole Cooperative Ditch Company read into the record the claimed rights of its members, as claimed through the Big Hole Ditch Company. As appears in the Ditch Company's Exhibit No. 1, said claimed rights total 2,000 miners inches of water from the Big Hole River as of January 1, 1914 for use on a total of 3,994 acres. Testimony was introduced to show that the Ditch Company operates a headgate and ditch, the ditch being commonly referred to as Owsley Slough, to supply the described flow of water to the described irrigated land. A common headgate is used to divert the water from the Big Hole River into Owsley Slough at a point on the east bank of the Big Hole River in the SE1/4 SW1/4 of Section 11, Township 4

*corrected  
20,000 in. I.*

South, Range 7 West of the Montana Principal Meridian.

Testimony was introduced to the effect that Owsley Slough has been in use since at least prior to 1881, that 1914 merely represents the filing date appearing on the exhibit and does not represent the date of first use of the respective claimed rights of the Ditch Company's members, and that in fact, most of the rights listed in Objector's Exhibit No. 1 date from between the 1850's and the 1880's. Several of the Ditch Company's representatives in general, and Ms. Ethelyn Elford, Secretary, in particular, testified that Objector's Exhibit No. 1 represents, to the best of their knowledge, true and accurate figures as to amounts of water actually used, when available, and as to places of use, again, when sufficient water is available for such use. Mr. Norman Ashcraft testified that only one member of the Ditch Company uses a sprinkler irrigation system. Mr. Ashcraft testified that the remainder of the members utilize flood irrigation techniques. Mr. Ashcraft testified that this fact, coupled with the particular local soil characteristics (shallow sandy soil over a gravel base) create an irrigation situation which requires substantially more than an average amount of water. Testimony was introduced that the soil in the vicinity of the objectors' land does not hold water and consequently must be flood irrigated every ten to twelve days. Mr. Ashcraft further testified that the Ditch Company generally has sufficient water to supply the needs of its members from

the start of the irrigation season until approximately the start of August. From August through the end of the irrigation season, the available water is insufficient to meet member's needs. Mr. Ashcraft testified that the ditch runs dry every 3 or 4 years. Mr. S.J. Seidensticker testified that he has the last point of diversion along the Ditch Company's facilities, that he generally has difficulty obtaining sufficient water from the Ditch Company after August 1, that every year he has to completely drain the Ditch Company's ditch so as to obtain sufficient water, that although such procedures do result in obtaining some water they nevertheless do not result in the obtaining of sufficient water from the Ditch Company's ditch, and finally that the ditch runs completely dry at Mr. Seidensticker's point of diversion along the ditch at least three out of every five years. Mr. Seidensticker testified that the problem with the low flow in the ditch is directly attributable to and representative of the low water level in the Big Hole River at such times.

8. Mr. S.J. Seidensticker testified in support of his own objection that he has, apart from his Big Hole Cooperative Ditch Company water rights, three separate points of diversion along the Big Hole River below the Ditch Company's point of diversion. Mr. Seidensticker testified that these points of diversion constitute, geographically, the last points of diversion along the Big Hole River. Mr. Seidensticker testified that he irrigates approximately 1,000 acres of

natural grassland from ditches originating at these three points of diversion, that these ditches have been used to divert water from the Big Hole River onto irrigated land on the Seidensticker Ranch continuously at least since the late 1870's, that the Seidensticker water rights on the river constitute some of the earliest rights on the river, and that every year the Big Hole River runs completely dry during the middle of August. Mr. Seidensticker testified that it is necessary for him to completely dam the Big Hole River below each of his three points of diversion just before the river runs completely dry, in order to collect as much water as possible to at least partially supply irrigation requirements during the latter part of the irrigation season when the riverbed itself is completely dry and when there is no natural flow. Mr. Seidensticker testified that the Montana Department of Fish and Game frequently objects to these dams. Mr. Seidensticker testified that the extreme lack of water in the Big Hole River during the latter portion of the irrigation season necessitates such damming so as to provide at least a minimal amount of water for his irrigation purposes. Mr. Seidensticker testified that 1975 is the first year in recent memory when it was not necessary to completely dam the Big Hole River to prevent a total lack of water for irrigation purposes. Nevertheless, Mr. Seidensticker testified that although the river did not run completely dry

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in 1975, there was still insufficient water to satisfy his existing needs. Mr. Seidensticker testified that the construction of upstream diversion and storage facilities near the source of supply of the Big Hole River could enable the withholding of sufficient quantities of presently unused spring runoff so as to create an adequate supply of irrigation water for both prior Big Hole River appropriators and as well for new Big Hole River appropriators. However, Mr. Seidensticker testified that until such upstream storage facilities are constructed, there will be insufficient water in the Big Hole River to supply existing users from August through the end of the irrigation season. Mr. Seidensticker testified that there are a total of 7 points of diversion (including his three) on the Big Hole River below the Big Hole Cooperative Ditch Company's points of diversion. Mr. Seidensticker additionally testified that there are at least 15 points of diversion, including those of several large ditch companies, above the Big Hole Cooperative Ditch Company's point of diversion, and below the gauging station near Melrose, Montana. Mr. Seidensticker testified that these diversions, in part, account for the fact that at times when the Melrose gauging station reports water flowing in the Big Hole River, the river at its lower extremity near Twin Bridges, Montana is completely dry. Additionally, testimony was introduced to the effect that in its lower reaches the Big Hole River flows on the side of the valley, rather than along the

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valley floor. Consequently there is little if any return flow into the Big Hole River from flood irrigation water removed from the Big Hole River. Testimony was introduced to the effect that any return flow seeps to the valley floor and flows into the Beaverhead River instead of returning to the Big Hole River.

9. Pursuant to the request of the Hearing Examiner at the hearing, on February 6, 1976, the Applicant, Montana Department of State Lands, prepared and offered into evidence a chart of the velocity of the stream flow in the Big Hole River at various times during the irrigation season. The figures supplied by State Lands were based upon flow figures for the 1973 irrigation season. The chart shows that the time required for water to travel along the path of the Big Hole River from one of the Applicant's proposed points of diversion (the particular point of diversion is not specified) to the Seidensticker Ranch Company varies from a minimum of 22.9 hours on April 26, to a maximum of 48.6 hours on October 1, and that similarly the time required for water to travel in the Big Hole River from one of the Applicant's proposed points of diversion to the Big Hole Cooperative Ditch Company's point of diversion varies from a minimum of 18.3 hours on April 26 to a maximum of 38.8 hours on October 1. A memorandum was enclosed to describe how the figures supplied were compiled. Copies of the proposed exhibit were sent to each

of the parties to this action, none of whom submitted a timely objection to the introduction of the exhibit into evidence. Consequently the exhibit was entered and numbered accordingly as Applicant's Exhibit No. 6.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the Big Hole River.

2. There are at times, primarily outside the period from August 1 to September 20, inclusive of each year, unappropriated waters in the source of supply.

3. There are at times, primarily during the period during August 1 to September 20, inclusive of each year, and at such other times when the Objectors herein and other valid prior appropriators on the Big Hole River cannot obtain sufficient water from the Big Hole River to meet valid prior uses, no unappropriated waters in the source of supply.

4. Pursuant to the Section 89-886(1), R.C.M. 1947, the valid rights of prior appropriators must be protected in the issuing of a Beneficial Water Use Permit.

5. The rights of prior appropriators will be protected if the permit is conditioned, limited and modified so as to protect those rights.

6. Proper scheduling of appropriation by the Applicant, specifically by disallowing appropriation by the Applicant from the period, August 1 to September 20, inclusive of each year, and as well by disallowing appropriation by the Applicant during such other portions of the period from May 1 to September 20, inclusive, of each year when there is insufficient water in the Big Hole River at the Objectors' respective points of diversion to meet the Objectors' prior rights, will insure that such prior existing rights will be protected.

7. The proposed means of diversion is adequate.

8. The proposed use of the water constitutes beneficial use.

9. The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

10. The Application for Beneficial Water Use Permit should be granted in accordance with the provisions of Chapter 8 of Title 89 of the Revised Codes of Montana.

11. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing upon the status of claimed rights of any other party except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

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PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's permit is granted in limited and modified form only, allowing the appropriation of no more than 9.36 cubic feet of water per second or 4,203 gallons of water per minute and not to exceed 1,395 acre-feet per annum from the Big Hole River, a tributary of the Jefferson River, in Madison County, Montana, to be diverted from the Big Hole River at two points: the W1/2 NW1/4 NE1/4 of Section 2, Township 3 South, Range 9 West, of the Montana Principal Meridian, and at the SW1/4 NE1/4 NW1/4 of Section 35, Township 2 South, Range 9 West, of the Montana Principal Meridian, and to be used for irrigation on a total of 609 acres, more or less in Section 36, Township 2 South, Range 9 West of the Montana Principal Meridian from May 1 to July 30, inclusive, of each year.

2. The Applicant is not allowed to appropriate water pursuant to the permit from the period, August 1 to September 20, inclusive, of each year, and as well is not allowed to appropriate water pursuant to the permit during such other portions of the period from May 1 to July 31, inclusive of each year, when there is insufficient water in the Big Hole River at the objectors' respective points of diversion to meet the objectors' prior rights to water from the Big Hole River.

3. The permit is granted subject to all prior existing water rights in the source of supply.

4. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and

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maintain adequate measuring devices to enable the Applicant to control and keep a record of all quantities of water diverted, as well as the periods of diversion. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

5. The permit is granted subject to any final determination of prior existing water rights as provided by Montana law.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to this Proposed Order, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will then be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 15th day of March, 1976.

Richard Gordon  
RICHARD GORDON  
HEARING EXAMINER